

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1264

To be argued by
ROBERT J. AURIGEMA

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ANTHONY NAPOLI,

Defendant-Appellant.

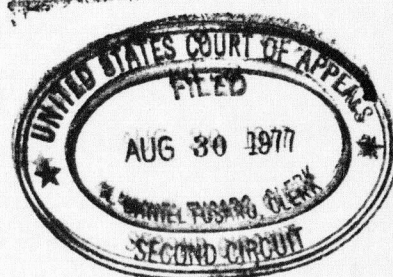
*On Appeal from a Judgment of Conviction of the United
District Court for the Southern District of New York.*

**REPLY BRIEF FOR
DEFENDANT-APPELLANT**

DORAN COLLERAN O'HARA
POLLIO & DUNNE, P.C.

Attorneys for Defendant-Appellant

1461 Franklin Avenue
Garden City, New York 11530
(516) 248-5757



10903

LUTZ APPELLATE PRINTERS, INC.

Law and Financial Printing

South River, N.J.	New York, N.Y.	Philadelphia, Pa.	Washington, D.C.
(201) 257-6850	(212) 840-9494	(215) 563-5587	(202) 783-7288

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT.....	1
ISSUES PRESENTED.....	2
ARGUMENT	
I. DEFENDANT NAPOLI WAS UNDULY PREJUDICED.....	3
A. The Evidence Regarding Defendant Napoli's 1972 Tax Situation Was Not Introduced By The Government On The Issue Of Intent.....	3
B. The Government Investigator's Testimony Coupled With The Prosecutor's Prejudicial Summa- tion Could Not Establish A Sample Relative To Defendant's Practice.....	14
C. The Conduct Of The Prosecutor Taken As A Whole Was Flagrantly Abusive.....	18
II. THE GOVERNMENT FAILED TO PROVE OBJECTIVE FALSITY ON THE PERJURY COUNT.....	20
III. THE UNNECESSARY RESORT TO PURE HEARSAY AS A BASIS FOR THE INDICTMENT HEREIN SHOWS A COMPLETE DISREGARD ON THE PART OF THE UNITED STATES ATTORNEY FOR THE GRAND JURY SYSTEM AND HAS SEVERELY PREJUDICED THE DEFENDANT.....	24
A. The Quality Of Evidence Presented To The Grand Jury.....	24
B. Second Circuit Standard.....	26
C. Attempted Perversion Of the Grand Jury System On The Part Of The Prosecutor.....	27
D. Plain Error And Waiver.....	28

	<u>Page</u>
IV. DEFENDANT HAS PROVEN AN INEFFECTIVE ASSISTANCE OF COUNSEL.....	29
V. EVEN WHEN MEASURED AGAINST THE CASES CITED BY THE GOVERNMENT THE ENTIRE SENTENCING PROCESS DEMONSTRATES A FAILURE BY THE TRIAL JUDGE TO EXERCISE DISCRETION AND INDIVIDUAL- IZE THE SENTENCE.....	31
CONCLUSION.....	34

TABLE OF CASES AND AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
<u>Davis v. United States</u> , 411 U.S. 233 (1973).....	28, 29
<u>Holland v. United States</u> , 348 U.S. 121 (1954).....	9
<u>Hull v. United States</u> , 324 F.2d 817 (5th Cir. 1963)...	16
<u>Maupin v. United States</u> , 225 F.2d 680 (10th Cir. 1955).	23
<u>United States v. Adderly</u> , 529 F.2d 1178 (5th Cir. (1976)).....	7
<u>United States v. Arcuri</u> , 405 F.2d 691 (2d Cir. 1968), <u>cert. denied</u> , 395 U.S. 913 (1969).....	25
<u>United States v. Bloom</u> , 538 F.2d 704 (5th Cir. 1976).	12
<u>United States v. Braunig</u> , 553 F.2d 777 (2d Cir. 1977).	29
<u>United States v. Briggs</u> , 457 F.2d 908 (2d Cir.), <u>cert. denied</u> , 409 U.S. 986 (1972).....	19
<u>United States v. Brown</u> , 548 F.2d 1194 (5th Cir. 1977).	16, 17, 18
<u>United States v. Bubar</u> , slip op. 4519 (2d Cir. June 30, 1977).....	29
<u>United States v. Byrd</u> , 352 F.2d 570 (2d Cir. 1965)...	10
<u>United States v. Capaldo</u> , 402 F.2d 821 (2d Cir. 1968), <u>cert. denied</u> , 394 U.S. 989 (1969).....	22
<u>United States v. Clemons</u> , 503 F.2d 486 (8th Cir. 1974).....	8
<u>United States v. Conlin</u> , 551 F.2d 534 (2d Cir. 1977).	10
<u>United States v. Corona</u> , 551 F.2d 1386 (5th Cir. 1977).	17
<u>United States v. Daniels</u> , slip op. 4579 (2d Cir. June 30, 1977).....	29, 30

<u>United States v. DeCicco</u> , 435 F.2d 478 (2d Cir. 1970)...	6, 7
<u>United States v. Estepa</u> , 471 F.2d 1132 (2d Cir. 1972)...	25, 27
<u>United States v. Field</u> , 432 F.Supp. 55 (S.D.N.Y. 1977)..	10
<u>United States v. Foss</u> , 501 F. 222 (1st Cir. 1974).....	32, 33
<u>United States v. Gallo</u> , 394 . 310 (D. Conn. 1975).	27
<u>United States v. Goodwin</u> , 492 d 1141 (5th Cir. 1974).	6
<u>United States v. Harrington</u> , 490 F.2d 487 (2d Cir. 1973)	25, 26
<u>United States v. James</u> , 555 F.2d 992 (D.C. Cir. 1977)...	6
<u>United States v. Johnson</u> , 165 F.2d 42 (3d Cir. 1947)....	22
<u>United States v. Kaufman</u> , 453 F.2d 306 (2d Cir. 1971)...	12
<u>United States v. Leonard</u> , 524 F.2d 1076 (2d Cir. 1975), <u>cert. denied</u> , 425 U.S. 958 (1976).....	9
<u>United States v. Marquez</u> , 462 F.2d 893 (2d Cir. 1972)...	28
<u>United States v. Matanky</u> , 482 F.2d 1319 (9th Cir.), <u>cert. denied</u> , 414 U.S. 1039 (1973).....	15
<u>United States v. McGrath</u> , slip op. 4827 (2d Cir., July 19, 1977).....	29
<u>United States v. Medico</u> , slip op. 3795 (2d Cir. May 25, 1977).....	29
<u>United States v. Messina</u> , 388 F.2d 393 (2d Cir.), <u>cert. denied</u> , 390 U.S. 1026 (1968).....	26
<u>United States v. Pastor</u> , 419 F.Supp. 1318 (S.D.N.Y. 1976).....	26, 27
<u>United States v. Ramirez</u> , 482 F.2d 807 (2d Cir.), <u>cert. denied</u> , 414 U.S. 1070 (1973).....	25, 26
<u>United States v. Ring</u> , 513 F.2d 1001 (6th Cir. 1975)....	6
<u>United States v. Rosenblum</u> , 339 F.2d 473 (2d Cir. 1964).	21, 22
<u>United States v. Rosenwasser</u> 550 F.2d 806 (2d Cir. 1977)	9, 11, 12, 18

<u>United States v. Schwartz</u> , 325 F.2d 355 (3d Cir. 1963)...	15
<u>United States v. Slutsky</u> , 487 F.2d 832 (2d Cir. 1973) <u>cert. denied</u> , 416 U.S. 937 (1974).....	9
<u>United States v. Sweig</u> , 441 F.2d 115 (2d Cir.), <u>cert. denied</u> , 403 U.S. 932 (1971).....	28
<u>United States v. Tumblin</u> , 551 F.2d 1001 (5th Cir. 1977)..	13
<u>United States v. Umans</u> , 368 F.2d 725 (2d Cir. 1966).....	26
<u>United States v. Williams</u> , 470 F.2d 915 (2d Cir. 1972)...	13

Statutes:

Rule 52(b) Fed. R. Crim. P.....	13
---------------------------------	----

Authorities:

5 Weinstein's Evidence, para. 901(b)(9)[03] at 901-114 (1976).....	14
---	----

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1264

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANTHONY NAPOLI,
Defendant-Appellant.

REPLY BRIEF FOR APPELLANT ANTHONY NAPOLI

Preliminary Statement

Defendant-Appellant Anthony Napoli submits this brief in reply to the answering brief of the United States of America served in the above entitled action on or about August 16, 1977.

Issues Presented

1. Whether defendant Napoli was unduly prejudiced.

A. Whether the evidence regarding defendant Napoli's 1972 tax situation was introduced by the government on the issue of intent.

B. Whether the government investigator's testimony coupled with the prosecutor's prejudicial summation could establish a sample relative to defendant's practice.

C. Whether the conduct of the prosecutor taken as a whole was flagrantly abusive.

2. Whether the government failed to prove objective falsity on the perjury count.

3. Whether the unnecessary resort to pure hearsay as a basis for the indictment herein shows a complete disregard on the part of the United States Attorney for the grand jury system and has severely prejudiced the defendant.

4. Whether defendant has proven an ineffective assistance of counsel below.

5. Whether the entire sentencing process, even when measured against the cases cited by the government, demonstrates a failure by the trial judge to exercise discretion and individualize the sentence.

POINT I

DEFENDANT NAPOLI WAS UNDULY
PREJUDICED.

A. The Evidence Regarding Defendant Napoli's 1972 Tax
Situation Was Not Introduced By The Government On
The Issue Of Intent.

Defendant has argued on this appeal that he was unduly prejudiced by the introduction of "evidence" concerning his 1972 federal tax return when such evidence was submitted to the jury on defendant's propensity to commit the crime charged in the present indictment, without a limiting instruction on its proper scope (D. Br. at 15-21). Although the trial court had expressly interjected itself into defendant's summation when defendant began to discuss reasonable doubt, the court stood mute as the government expressly instructed the jury that it could find guilt of the crimes charged from guilt of a prior understatement of \$9,000 in income on the questioned return (A. 335a - 337a)*.

To ameliorate the effect of this clearly improper inference, the government now suggests for the first time on appeal that this evidence was introduced on a question of intent (G. Br. at 16-17). While this in itself would not cure the tainted inference, the government undoubtedly feels that the statement that a person would be "willing" to commit one crime

*References to pages in the Joint Appendix are preceded by "A".; references to Appellant's Exhibit Volume are preceded by "E"; references to the Government's Brief are preceded by "G.Br."; references to Appellant's Main Brief are preceded by "D.Br.".

if he committed a crime in the past is somehow relevant to a defendant's state of mind as opposed to his propensity to commit the crime in question.

It is undisputed, however, that the testimony elicited on defendant's cross examination was introduced in an attempt to contradict defendant's testimony on direct where he stated that he earned \$22,000 in 1972 (D. Br. at 16-17; G. Br. at 15). It went in on impeachment and impeachment only. It was expressly directed toward the testimony of the amount of income earned in that tax year (G. Br. at 15; A. 273a, 282a). The credibility of the witnesses involved, after all, was conceded by both the government and the defense as the primary issue at trial (A. 79a, 81a, 320a, 333a).

To justify its introduction on a question of intent, it was necessary for the government on appeal to misstate the entire thrust of the case below (G. Br. at 16). The government produced fifteen (15) witnesses who testified that they did not visit defendant the amount of times stated in the invoices submitted by defendant for payment. The defendant testified that the invoices were accurate, save for one isolated error of transcription (A. 273a). The main issue was the credibility of the witnesses and more significantly, as conceded by the government, the ability of these witnesses to recollect events as far back as five (5) years from the time of testimony (A. 79a, 320a).

The government now seeks to paint the case as if the defendant admitted that all the invoices contained overbillings

but such was the result of inadvertence on the part of defendant (G. Br. at 16, 18-19). This is a total misstatement of what transpired below.

The only inadvertence suggested below was one apparent error relating to a patient who was in the hospital on one of the dates noted in the invoice (A. 273a) in the transcription of one hundred and fifty (150) invoice entries. The defendant never testified that the particular visit in question did not occur but rather that, with the overwhelming amount of paper work inherent in a medicaid practice, the wrong date could have been transposed from the defendant's records on to the invoice (Id.). This could hardly put intent in issue. It could hardly have been argued that approximately 150 invoice entries were the result of transcription errors nor was such a ludicrous argument made to the jury.

The only other possible basis upon which the government could suggest inadvertence as a defense was the possibility that the fifteen (15) witnesses lost or lent their medicaid cards to others. The testimony of the government witnesses, however, was uncontroverted that they did not lose or lend these cards at any of the times in issue* as acknowledged by the government in its brief (G. Br. at 7). In any event, the testimony placed all the witnesses in defendant's office at or about the time stated in the invoices. All the witnesses

*The only witness who wavered in this regard was Rivera who stated that she lost her card in the hot months, went on to state that it was at the end of the year and ended by stating that she didn't know when she lost it (A. 251a, 254a).

testified that they went to a chiropractor at least once or twice, but not the number of times in the invoices. Consequently, the government's response to defendant was to shrug off this suggestion (A. 350a). This could hardly be termed a substantial issue of inadvertence.

The state of the record and the government's need to repaint it is indicative of the fact that the government never intended to introduce this testimony on the issue of intent. Rather, the government now makes this argument from hindsight in an attempt to justify its propensity inference. Case law bears this out.

Intent, for the purposes of introduction of "other crime" evidence, is not raised by the government's mere assertion that it is in issue. Rather, it must be a substantial issue in the case. United States v. DeCicco, 435 F.2d 478, 483-484 (2d Cir. 1970); United States v. Goodwin, 492 F.2d 1141, 1151 (5th Cir. 1974) (critical ingredient); United States v. James, 555 F.2d 992, 999 (D.C. Cir. 1977) (material issue).

As the Fifth Circuit has recently stated:

"Whether there is a material issue as to this element of intent depends not on the statutory definition of the offense but on the circumstances of the case and on the nature of the defense. United States v. Ring, 513 F.2d 1001 (6th Cir. 1975). A defendant who admits committing an act but relies on innocence, mistake, or lack of knowledge to exculpate him has made an issue of intent. A defendant who denies participation in an act raises no discrete

issue of intent and if the act be proven
the intent will usually be inferred."
United States v. Adderly, 529 F.2d
1178, 1181 (1976) (Emphasis added).

Defendant did not admit the act of submitting false invoices thereby not leaving his intent in issue.

The only genuine issue in the case at bar was the credibility of the witnesses involved (A. 79a, 320a). In a case centering around the need for the defense to impeach the credibility of a government witness, this Court rejected the use of other crime evidence proffered on an issue of intent. United States v. DeCicco, supra at 483-484. That the issue of credibility in the present case was equally as substantial cannot be, and is not, disputed.

Even assuming arguendo that intent was in issue in the case at bar, the government's failure to prove intent in the prior "crime" is indicative of its use of that evidence merely to contradict the defendant's testimony.

The fact that government's Exhibit 26, which was prepared on an accrual basis, shows a figure different from defendant's tax form which was prepared on a cash basis, can be attributed to the distinction between a cash and an accrual method of accounting (A. 284a; E. 29, 33). Given the distinction in methods, the government has merely shown how much money accrued to the defendant in 1972, but not how much was actually paid to him. This is consistent with the defendant's testimony that factoring costs were discounted off the top before the defendant

received any money from his medicaid practice and that disallowances for certain claims were also deducted by the factor (A. 283a - 284a).

Defendant further testified that there was a labeling error in the administrative cost deduction on his Schedule C (A. 284a - 285a). The return was prepared by a tax preparer. In between the governmental agencies and defendant, there was a factor. The possibility for error was present. Moreover, this tax question was sprung on the defendant at trial with no prior notice. He was testifying from recollection of detailed financial events of five years prior. There was no evidence that defendant intentionally transmitted false information to the preparer. The defendant had no records in court other than the tax form supplied by the prosecutor (E.30-35) to refresh his recollection on these past events.

Where prior conduct is to be admitted to show knowledge and intent, the proof must be clear enough and the fact situation proven must clearly warrant a jury finding that the prior conduct was intentional or knowing. United States v. Clemons, 503 F.2d 486, 490 (8th Cir. 1974). Where the prior conduct proved by the government is equally consistent with an innocent explanation or is simply too incomplete, the courts will not permit its introduction on a question of intent for the obvious reason that it could have no probative value on the present intent question (Id.).

Even if it is assumed that the government established an understatement of income, proof of a mere understatement of income is not enough to establish the requisite intent for a prima facie case of tax evasion. United States v. Slutsky, 487 F.2d 832, 844 (2d Cir. 1973) cert. denied 416 U.S. 937 (1974); See also Holland v. United States, 348 U.S. 121, 139 (1954).

If the government had intended to use the tax testimony for something other than contradiction to impeach the defense's sole factual witness (i.e., the defendant), it would have had to probe more deeply into the tax situation, an inquiry which undoubtedly should have involved the tax preparer as well as the records underlying the entries in Exhibit 27. Instead, it was content with nothing more than a surface showing of contradiction, and only at this stage of the proceedings seeks to justify its use of the testimony as probative of intent. Yet on the very day of trial, the government had subpoenaed defendant's factor but did not attempt to elicit from him the amount of money actually paid to the defendant in 1972 (A. 244a). As presented, the evidence of intent on the prior tax transaction was not established by clear and conclusive evidence as required by United States v. Rosenwasser, 550 F.2d 806, 808 n. 3 (2d Cir. 1977), nor even by a preponderance of the evidence. United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

Moreover, even if intent were in issue in the present case, the evidence of the tax transaction if it had been introduced on the issue of intent would merely have been cumulative on that issue. The government charged a pattern of conduct consisting of the fifteen charged counts which, if proven, would have been sufficient to establish the requisite intent for the commission of medicaid fraud. United States v. Field, 432 F. Supp. 55, 60 (S.D.N.Y. 1977); see also United States v. Conlin, 551 F.2d 534, 536 (2d Cir. 1977). This the government itself has conceded in its appellate brief when it alleged that it proved the requisite intent on the medicaid counts (G. Br. at 10-11).

The requisite intent could be inferred from even one instance of overbilling. The government has attempted to show fifteen such instances encompassing approximately 150 invoice entries. This cumulation of similar count evidence would have been more than sufficient proof of intent. The government was not suffering from a lack of evidence on intent and consequently there was no "pressing necessity" for the government to offer evidence of this prior activity on the question of intent. United States v. Byrd, 352 F.2d 570, 574-575 (2d Cir. 1965).

The government, moreover, seeks to suggest that the tax evidence was probative on mens rea which the government contends was in issue in the perjury count (G. Br. at 16). This theory is easily dispelled. At no time did the government

request the court to charge this bit of "necessary" evidence to the jury on the perjury count. Moreover, the inference instruction given by the prosecutor, which the government seeks to justify on this basis, nowhere mentioned the perjury count (A. 350a). The government had for all practical purposes tied the perjury count directly into the medicaid counts suggesting to the jury that if they believed one of the fifteen government witnesses, defendant was guilty of perjury (A.321a-322a).

In any event, even if intent were at issue and the tax evidence were received for that purpose, the inference which the government suggested to the jury was still improper. It was a plain and simple propensity suggestion which required the jury to find the guilt of the crimes charged from the guilt of an alleged prior "crime".

One need only look at the care with which the courts proceed in their charges when other crime evidence is introduced on the issue of intent to establish the clear impropriety of this inference. In United States v. Rosenwasser, supra, 550 F.2d at 807 n. 2, the court took care to give a limiting instruction as the testimony relating to intent went in and also at the end of the government's opening statement. Moreover, the court later repeated this instruction in its charge to the jury. Id. at 808 n. 3.

The court there was clear to note that the evidence of the prior or subsequent crime could not be taken as proof that the accused committed the offenses charged in the indictment nor

even the act charged. Yet this is precisely what the government asked this jury to do (A. 350a). The jury in Rosenwasser was further instructed that it had to find, beyond a reasonable doubt, the commission of the act from independent evidence before it could consider the other crime evidence as bearing on the accused's state of mind. 550 F.2d at 808 n. 3.

This is a far cry from what the government suggested to the jury in the present case. The courts have expressly recognized that to charge "willingness" to commit a crime is to charge a propensity to do so. United States v. Bloom, 538 F.2d 704, 711 (5th Cir. 1976).

Based on the foregoing, the cases cited by the government are readily distinguishable (G. Br. at 16). What is in issue in each case, as well as the need for the other crime evidence in each case, is determined by the facts of the particular case. In those cases cited by the government, intent was clearly in issue and there was a particularized need for the evidence. In the present case, the credibility of the witnesses was the only substantial question litigated.

Nor can it be said that this is a question of a taxpayer accused of merely deceiving the government with respect to income tax deductions. United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971). The defendant is accused of understating \$9,000 of gross income. Moreover, the \$9,000 is alleged to come from medicaid money, the very subject of the counts charged in

the indictment. Such cannot be said not to inflame the passions of the jury.

In United States v. Williams, 470 F.2d 915, 918 (2d Cir. 1972) the court held that an inference suggesting that a person who would deceive an employer would not hesitate to give a phony tax return to the government was not "flagrantly abusive." In that case, unlike the present case, the intent to deceive in the prior transaction was clearly established and intent was a substantial issue at trial. Moreover, the prior act of misconduct was merely an attempt to keep an employer from finding out about an employee's moonlighting. In the present case, defendant was labeled as a tax evader who not only cheated the government out of money but secreted that very money from the I.R.S. It is submitted that the court in Williams was not giving the government a license to use such abusive inferences in the future.

In the present case, it is respectfully submitted that the alleged prior crime evidence came in only on the issue of credibility, further compounding an already abusive inference. In these circumstances the court's failure to provide limiting instructions constituted plain error within the meaning of Rule 52(b), Fed. R. Crim. P.*

*In United States v. Tumblin, 551 F.2d 1001 (5th Cir. 1977), the court noted that the dangers of using prior crimes evidence to imply that the defendant is a "bad seed" "exist at their most devastating level" when the crucial question before the jury is the credibility of the witnesses. Id. at 1005.

B. The Government Investigator's Testimony Coupled With
The Prosecutor's Prejudicial Summation Could Not
Establish A Sample Relative To Defendant's Practice.

The government, while taking the incredible position that the Morey testimony (A. 258a - 261a) and the prosecutor's summation (A. 314a) cannot be thought of as suggesting what any patient other than the 15 government witnesses would testify to, also argues that it has shown a "true sample" based on the 45 people contacted by the government in this case, thus establishing a one in three ratio of alleged overbillings to contactees (G. Br. at 19-20). Although the government in its brief overlooks the clear language of the prosecutor as he made the "one out of three" argument to the jury (See D. Br. at 21-22), the government nevertheless suggests that such an inference could have been charged to the jury, in any event, as a ratio establishing other crime evidence not charged in the indictment but permeating the extent of defendant's practice.

The government's contention that the 45 people contacted by Morey established a sample is clearly untenable. It is fundamental that the admissibility of a sample depends upon its trustworthiness. 5 Weinstein's Evidence, para. 901(b) (9)[03] at 901-114 (1976). The so-called "Morey sample" was conducted by a claims representative trainee (A. 259a), who established a control group of defendant's patients based on, as the government would have us believe, the input of her two "undoubtedly reliable" variables: 1) "I felt I had

an adequate number of witness," and 2) "my appointment as an investigator would have ended in February so I did not have time to contact more" (A. 260a). From these "sound" premises, the government argues that a one out of three ratio may be applied to the remainder of the defendant's clientele. Clearly, this baseless and most arbitrary "Morey sample" must be rejected.

United States v. Matanky, 482 F.2d 1319 (9th Cir.), cert. denied, 414 U.S. 1039 (1973), cited by the government as authorizing the jury to consider a continuous pattern of conduct (G. Br. at 18), is clearly distinguishable. In Matanky, 39 medicare claim forms were admitted into evidence. Id. at 1321. As so recognized by the court, it was from these records that the dollar amount of allegedly false billings could be established. Id. at 1324. In the present case, the alleged inference, interjected by the prosecutor, is based on pure speculation. Furthermore, the Matanky court actually approached the prosecutor's remarks from a harmless error point of view, and implicitly recognized these remarks as error. Id. The most fundamental difference between Matanky and the case at bar, however, is that the prosecutor in the former did not reach outside the evidence to suggest other crimes not charged, as did this prosecutor in the court below.* The prosecutor's remarks as to the possibility of other crimes

*Having done so, the court below was obliged to admonish the jury to disregard those remarks, and attempt to remove their malignant effect. United States v. Schwartz, 325 F.2d 355, 358 (3d Cir. 1963).

perpetrated on other patients not contacted (A. 314a) is clearly improper. Cf. Hull v. United States, 324 F.2d 817, 826 (5th Cir. 1963).

The government attempts to distinguish United States v. Brown, 548 F.2d 1194 (5th Cir. 1977), by contending that the admission of hearsay testimony of the government investigator therein led to that court's finding of reversible error (G. Br. at 20-21). Further, the government notes that while the trial court in Brown allowed an answer to the prosecutor's question concerning the results of an audit of tax returns not charged in the indictment, the trial court herein excluded such evidence. The government contends that the court below issued a general warning to the jury that counsel's questions were not evidence, thereby curing any possible prejudice emanating from this prosecutor's suggestive inquiry along the same lines that were condemned in Brown (G. Br. at 21; A. 261a).

The Brown court was concerned with the hearsay nature of the other crime evidence introduced to increase the ratio within the alleged "sample" itself, which testimony was unreliable because it was hearsay, and on that basis, as well as its prejudice, could not qualify as other crime evidence.

In the present case, the prosecutor attempted to increase the ratio within the sample also, but was cut off by the trial court (A. 261a). Of course, the suggestive question made its point and the court's instruction, not when the question was asked, but rather 12 witnesses prior to Morey's

appearance on the stand, that questions were not evidence (A. 147a), has been recognized as totally ineffective to cut off the prejudice directly emanating from the asking of the question. United States v. Corona, 551 F.2d 1386, 1390 n.3 (5th Cir. 1977).

In an apparent effort to bolster its "Morey sample" the government further notes that in Brown "[t]he court never intimated that there would be anything improper in demonstrating that the 12 counts that went to the jury were taken from a sample of 160 tax returns" (G. Br. at 21). However, the government in Brown did not seek to expand its sample of tax returns over and above the number of returns actually audited, whereas the prosecutor's summation herein sought to apply the one out of three ratio to those of defendant's patients never contacted (A. 314a). Thus by way of the prosecutor's allegedly gratuitous use of the one out of three ratio (G. Br. at 21 n.*) he effected an expansion of the very base of the sample and extended it throughout the defendant's practice. This accomplished the same thing that the government in Brown sought to accomplish, namely, expand the number of similar counts attributable to defendant, but with a significant distinction, to wit, instead of its reliance on hearsay as in Brown, this Court can rely on no evidence for these other counts. The advantage obtained by increasing the base from 45 to 1500 and suggesting one third overbilling more than compensated for the government's not being

able to increase the ratio within the 45.

Accordingly, it does little for the government to argue, as it does, that the present situation is distinct from Brown on the ground of the hearsay nature of the testimony there. In the present case, the testimony and summation do not rise to the dignified level of inadmissible hearsay and can only be characterized as nothing more reliable than total speculation and innuendo. Between the Morey testimony and the prosecutor's suggestions, the government was allowed to utilize countless other crime counts without bothering to introduce one piece of evidence substantively probative thereof, a far cry from the clear and conclusive standard. See United States v. Rosenwasser, supra. 550 F.2d at 808 n.3.

C. The Conduct Of The Prosecutor Taken As A Whole Was Flagrantly Abusive.

The government is careful in its brief to point out that it explicitly told the jury that the present case was not a case about the ping-ponging of patients (G. Br. at 23). Yet, in the record, the government's description of the prosecutor's summation is sandwiched between his admonition to the jury to "[t]hink of all these people sent by the receptionist" and an utterly unsupported statement that all the witnesses were ping-ponged (A. 316a). This constituted a prejudicial use of other crime evidence by implicating defendant, as an obvious beneficiary, in merely another medicaid fraud on the public. There was absolutely no issue of the government witnesses'

intent in this case on which evidence of ping-ponging could be germane. The witnesses themselves testified as to their intent.

It is obvious that the prosecutor interjected his personal beliefs as to the credibility of the defendant's character witnesses (G. Br. at 24). Moreover, the fact that the records of the defendant were not produced only amplifies the prejudice of the prosecutor's baseless assertion that they would have been falsified in any event (G. Br. at 25).

Defendant was exposed to a propensity inference flatly requesting the jury to find guilt on the indicted counts from guilt of an alleged tax evasion; defendant was exposed to the suggestion of 485 similar medicaid count charges; he was accused of being the beneficiary in a ping-ponging scheme and falsifying every record he could ever make. It is submitted that the statements of the prosecutor on summation were flagrantly abusive and calculated to enflame the passions of the jury thereby affecting the integrity of the trial. United States v. Briggs, 457 F.2d 908, 912 (2d Cir.), cert. denied, 409 U.S. 986 (1972).

POINT II

THE GOVERNMENT FAILED TO PROVE
OBJECTIVE FALSITY ON THE PERJURY
COUNT.

Contrary to the government's assertions (G. Br. at 28), it is not presently and was never the defendant's position that he "misunderstood" the question put to him at the grand jury which formed the basis for the perjury count. Rather, defendant contends that the government has wholly failed and not even attempted to meet its burden of proving the more precise issue raised in defendant's brief, to wit, the issue of objective falsity of defendant's testimony before the grand jury (D. Br. at 30-34).

A review of defendant's grand jury testimony plainly reflects that notwithstanding the inquisitor's alleged unlimited scope of inquiry, both the Assistant United States Attorney conducting the grand jury proceedings and defendant clearly understood the questions to be related to the Galler Clinic only. This type of questioning (i.e., questions with the general phraseology "did you ever" or seemingly unlimited in scope) was put to defendant both prior and subsequent to the testimony forming the basis for the perjury count and these questions were clearly attempts to elicit information concerning defendant's activities at the Galler Clinic only (See E 62 (whether the defendant ever authorized anyone to sign his name); E 69-70 (whether the defendant ever engaged in ping ponging); E 70

(whether the defendant was asked to use a particular surgical supply house, laboratory or pharmacy); E 74-75 (as to the average patients that the defendant could see per day)). The question as to the invoices which formed a basis for the perjury count (E 72) was thus merely another in a series of questions relating to the operation of and defendant's participation in the Galler Clinic.

Furthermore, the cases relied upon by the government to limit the right of review on appeal are completely inapposite (See G. Br. at 26). Those cases involved attempts to admit additional evidence which was either of a corroborative or cumulative nature. In the case at bar, by offering the transcript of defendant's grand jury testimony, defendant was attempting to introduce neither corroborative nor cumulative evidence. Rather, the proffered transcript was directed to the paramount question of whether defendant's testimony (1) on the basis of the proof adduced by the government, and (2) when taken in proper context, see p. 22 infra, can be a criminal act.

The government also relies upon United States v. Rosenblum, 339 F.2d 473 (2d Cir. 1964) for the proposition that there is no per se requirement that a full grand jury transcript be admitted into evidence on a perjury prosecution arising out of such testimony (G. Br. at 27). A more accurate and complete analysis of Rosenblum, however, demonstrates that the government's analysis of that case was less than forthright. In

Rosenblum it was stated:

"... it is not required that all the Grand Jury testimony be put in the record, provided that the statements admitted are given sufficiently in their context so as not to confuse the trier." Id. at 475 (emphasis added). (citation omitted).

The government has completely ignored the proviso language emphasized above i.e. that the statements be admitted "sufficiently in their context." See also United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969); United States v. Johnson, 165 F.2d 42, 48 (3d Cir. 1947) (sufficient context necessary so that jury may have "accurate motion of what was said and under what circumstances"). Sufficient context is of acute importance here. The government nevertheless chooses to ignore the "context" problem by smoke screen defenses involving technical niceties, blind to the fact that the need for sufficient context must be equated with the guilt or innocence of the defendant on the perjury count.

In failing to abide by the Rosenblum proviso, the court below abused its discretion in not allowing defendant to reopen his case and place the full grand jury transcript into evidence. Such prohibition effectively deprived the trier of fact of "sufficient context" in connection with its deliberations on the perjury count.

The trial court's abuse of discretion is further accentuated by its own self-contradicting statements. Judge MacMahon, knowing full well that precision is imperative when a

perjury count is involved, charged the jury, inter alia, "to determine just what statements of fact the defendant made" (A. 373a) and whether the defendant "believed his statement was true" (A. 374a). Yet, on the other hand, when requested by defendant to place the isolated grand jury testimony in context, the court stated that "there is no room for mistake about context" (A. 378a). In so doing, the court effectively made a specific finding of fact thereby impinging upon the province of the jury and defendant's right to a trial by jury.

The evidence presented to the jury on the perjury count was a naked, isolated and single item of proof. Contrary to the government's suggestion (G. Br. at 29), the mere fact that the defendant stipulated to the asking and answering of that isolated question does not mean that sufficient evidence went to the jury on the perjury count. And the mere fact that both parties have rested and the court has given its charge, does not prevent the admission of further evidence. Maupin v. United States, 225 F.2d 680, 682 n. 7 (10th Cir. 1955).

Finally, as if suggesting some prejudice was visited upon the government by the defendant's failure to take affirmative action in this criminal prosecution, the government suggests that it was somehow prevented from proving that, even answered in the context of Galler only, defendant's testimony was still perjurious (G. Br. at 30). The government suggests that testimony "was available" from Galler patients to prove that defendant overbilled with respect to the Galler Clinic (Id.). What the

government conveniently fails to point out, however, is the fact that it was the government's pretrial decision, and its decision alone, not to proceed on the Galler related counts (A. 65a).

Finally, the government suggests that since the jury, during the course of its deliberations, never asked to see any of the exhibits, it therefore would not have asked for the grand jury transcript had it been in evidence (G. Br. at 30-31). This argument is typical of the unfounded, speculative reasoning that so pervades the government's case. The prosecutor's conjecture regarding the jury's reaction during its deliberations cannot cure the trial court's error in refusing to admit the grand jury transcript.

POINT III

THE UNNECESSARY RESORT TO PURE
HEARSAY AS A BASIS FOR THE
INDICTMENT HEREIN SHOWS A
COMPLETE DISREGARD ON THE PART
OF THE UNITED STATES ATTORNEY FOR
THE GRAND JURY SYSTEM AND HAS
SEVERELY PREJUDICED THE DEFENDANT.

A. The Quality Of Evidence Presented To The Grand Jury.

Defendant has already fully acknowledged that in certain instances the use of hearsay testimony only may be sufficient to uphold the validity of an indictment (D. Br. at 37). The government suggests that purely hearsay testimony before a grand jury is authorized subject only to the provisos that: (1) the prosecutor does not deceive the grand jurors

as to the shoddy merchandise of the hearsay testimony so that they can seek something better if they wish; and (2) the case does not involve a high probability that with eye-witnesses rather than hearsay testimony the grand jury would not have indicted (G. Br. at 33). However the government ignores the plain reasoning in United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) which formed the basis of the dismissal of the indictments therein. The Estepa Court dismissed the indictment because of the failure of the United States Attorney in the Southern District of New York to abide by specific representations made to this Court, that wherever at all possible, witnesses with first hand knowledge would be relied upon as the basis for the securing of an indictment. See United States v. Arcuri, 405 F.2d 691, 693 n. 4 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969). In order "to translate [these] assurances of the United States Attorneys into consistent performance by their assistants" this Court, with proper respect for discharge of its duties, did not hesitate to dismiss the indictment. United States v. Estepa, supra, 471 F.2d at 1137.

The Government however further attempts to make the point that both United States v. Harrington, 490 F.2d 487 (2d Cir. 1973) and United States v. Ramirez, 482 F.2d 807 (2d Cir.), cert. denied, 414 U.S. 1070 (1973), decided subsequent to Estepa, supra, prohibit only prosecutorial deception as to hearsay testimony and not prosecutorial disregard of specific

representations made to this Court. For the following reasons, those cases are clearly distinguishable.

In Harrington, first hand evidence was presented to the grand jury which indicted the defendant (490 F.2d at 489), and therefore the United States Attorney in Connecticut did not disregard the representations which his office made to this Court (See United States v. Messina, 388 F.2d 393, 394 n. 1 (2d Cir.), cert. denied 390 U.S. 1026 (1968), as did the United States Attorney herein.

In Ramirez, the trial on the indictment took place prior to the decision in Estepa. 482 F.2d at 811. Further, the Ramirez Court specifically noted that this Court has cautioned "against the unnecesenary use of hearsay testimony when the eyewitnesses are reasonably available to testify before the grand jury. That caution is repeated and re-emphasized here." 482 F.2d at 811 n. 3.

B. Second Circuit Standard

It is thus clear that the law in this Circuit is, as set down eleven years ago by this Court in United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966) that hearsay testimony before a grand jury can only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses who are able to testify from personal knowledge. Cases subsequent to those cited in the government's brief clearly show adherence to that principle. See United States v. Pastor, 419 F. Supp. 1318, 1324 (S.D.N.Y.

1976) (dismissing the hearsay based indictment); United States v. Gallo, 394 F. Supp. 310, 314 (D. Conn. 1975) (particularly noting the widespread use of hearsay before the grand jury found in Estepa in disregard of this Court's warning to prosecutors).

C. Attempted Perversion Of The Grand Jury System On The Part Of The Prosecutor.

It is indeed a sad commentary on the regard which the United States Attorney has, or more appropriately does not have, for the constitutional and historic function of the grand jury system, as evidenced by the position taken in the government's brief that it was "demonstrably inconvenient" for the twenty (20) witnesses named in the counts in the indictment to testify personally before the grand jury "for the minute or two required to simply repeat or adopt what they had previously stated to Mrs. Morey" (G. Br. at 35). The United States Attorney obviously considers the process in which the indictment herein was secured as a mere formality to satisfy a "mere verbal exercise" engaged in by the framers of the constitution (See e.g., United States v. Estepa, supra, 471 F.2d at 1136).

A review of the record clearly shows that the government cannot demonstrate any such inconvenience. All of the government witnesses who testified at trial lived well within the New York City limits, no further than a few subway stops away from the United States Courthouse where the grand

jury which indicted the defendant was sitting (See A. 84a, 104a, 122a, 131a, 140a, 154a, 163a, 175a, 183a, 193a, 203a, 215a, 223a, 233a, 250a). To meet the "demonstrably inconvenient" standard set by this Court, the United States Attorney must show more than make the mere naked assertions of "scheduling problems" (G. Br. at 35; see eg., United States v. Sweig, 441 F.2d 115, 121 n. 7 (2d Cir.), cert. denied, 403 U.S. 932 (1971) (demonstrably inconvenient to summon the Speaker of the United States House of Representatives before a grand jury, in the Southern District of New York, however, transcript of interview, rather than government investigators' characterizations of answers were submitted to grand jury)), or that the investigator in charge was due to be transferred, notwithstanding that the full and complete resources of the United States government was still at the prosecutor's disposal.

D. Plain Error And Waiver.

The cases cited by the government in support of its argument that any claim to a defect in the indictment is waived are completely irrelevant (G. Br. at 32). Thus, in United States v. Marquez, 462 F.2d 893 (2d Cir. 1972), this Court examined the merits of defendant's claim on the hearsay based indictment even though not raised below found "sufficient, unchallenged, competent testimony the grand jury to indict." Id. at 896. Davis v. United States, 411

U.S. 233 (1973), United States v. McGrath, slip op. 4827 (2d Cir. July 19, 1977) and United States v. Braunig, 553 F.2d 777 (2d Cir. 1977) are all cases which neither involve hearsay based indictments nor prosecutorial misconduct in not complying with representations made to this Court in the exercise of its supervisory powers. The hearsay based indictment returned herein is plain error, and defendant has shown good cause to be granted relief from any waiver (See D. Br. at 41-42).

POINT IV

DEFENDANT HAS PROVEN AN INEFFECTIVE ASSISTANCE OF COUNSEL.

The cases cited by the government, arguing that a farce and mockery must be proven to show ineffective assistance of counsel (G. Br. at 37-39), only reconfirm defendant's observation that the "reasonable competency" test has been established by this Court.

Thus in United States v. Medico, slip op. 3795 (2d Cir. May 25, 1977), this Court, while recognizing a "farce and mockery" rule, examined counsel's inadequacy "[e]ven under the more liberal standards followed in other circuits". Id. at 3812 n. 15.

Although United States v. Bubar, slip op. 4519 (2d Cir. June 30, 1977) does contain some language reaffirming the Wight standard (See eg., id. at 4536), the very same day that Bubar was decided, this Court in United States v. Daniels,

slip op. 4579, 4585 (2d Cir. June 30, 1977) considered counsel's performance under the more liberal standards governing other circuits.

It is respectfully submitted that under this true standard of "reasonable competency", the government's brief has aided in showing the ineffective assistance of counsel by arguing no less than seven times, that defendant has waived appellate review of the errors committed below (G. Br. at 13-14, 14, 15, 17 n.***, 23, 24, 31-32). Should this Court give credence to the government's waiver argument by declining to review the merits of an otherwise justifiable claim of error below, then a showing has been made of trial counsel's ineffective assistance.*

*The government further notes that trial counsel below brought out a flood of inconsistencies and other detrimental impeaching evidence on his cross-examination of the principal witnesses against the defendant (G. Br. at 39-42). It is thus wholly incongruous to argue that the evidence against the defendant was "overwhelming" (G. Br. at 2), and more than sufficient on all counts, notwithstanding the fact that credibility of the witnesses was the main issue (A. 79a). Defendant would be hard pressed to devise a more cogent argument that the verdict is not supported by the weight of the credible evidence than the government's showing in its appellate brief (G. Br. at 39-43).

One further misstatement of the government must also be corrected. The government alleges that defendant's statement of facts "goes outside the evidence presented at trial" with respect to the courtesy treatments among the doctors at the clinic (G. Br. at 9 n.*). It fails to point out to this Court however that evidence of the courtesy treatments was elicited from one of its own witnesses (A. 237a - 238a).

Rather, it is really the government which goes outside the record and evidence in advising this Court what proof it would have introduced concerning this very same practice (G. Br. at 4 n.*)

POINT V

EVEN WHEN MEASURED AGAINST
THE CASES CITED BY THE GOV-
ERNMENT THE ENTIRE SENTENCING
PROCESS DEMONSTRATES A FAILURE
BY THE TRIAL JUDGE TO EXERCISE
DISCRETION AND INDIVIDUALIZE
THE SENTENCE.

The government would have this court believe that defendant challenges the sentence imposed solely on the ground that the court observed a predetermined, fixed or mechanical approach concerning defendant's conviction of medicaid fraud (G. Br. at 43). Such an argument is sorely inaccurate.

More precisely, defendant properly challenges the entire "judicial process" employed by the court in determining the particular punishment (D. Br. at 49).

The sentence imposed was articulated, not in terms of disciplining the particular wrongdoer, but rather in terms of an "announcement", a broadcast, to the entire medical profession. It was as though the actions of the defendant were the embodiment of all convicted medicaid fraud defendants. Such a procedure is demonstrative of a sentence void of any exercise of discretion whatsoever. Very simply, the trial judge failed to observe his mandate to tailor the sentence to the circumstances surrounding both the individual and the offense (D. Br. at 51). A sentence determined by class and category of crime was imposed poignantly subordinating the individual and

the goals of criminal punishment (D. Br. at 52-54).

Contrariwise, the government unconvincingly argues, in conclusory terms, that the comments made by the trial judge (see D. Br. at 50) are (1) indicative of nothing more than a "need to discipline Napoli as a wrongdoer and...to deter others from committing like offenses" and (2) that such general deterrence is a valid factor to consider in arriving at a proper sentence (G. Br. at 45).

While general deterrence is a constitutionally valid criteria in the determination of a defendant's sentence, it is not the sole criteria. There must be full consideration of all factors in order for the trial court to fulfill its duty to individualize the sentence. In United States v. Foss, 501 F.2d. 522 (1st Cir. 1974), cited by the government, the court provided a basic meaning of the duty to individualize the sentence:

"The court's duty to 'individualize' the sentence simply means that whatever the judge's thoughts as to the deterrent value of a jail sentence, he must in every case reexamine and measure that view against the relevant facts and other important goals such as the offender's rehabilitation. Having done so, the district judge must finally decide what factors, or mix of factors, carry the day."
501 F.2d 522, 528.

In Foss, the defendant, much like the defendant herein, argued that the trial judge imposed the punishment by class

and category of crime without individualizing the sentence.* The trial judge, however, narrowly avoided the impermissible by countervailing his stern attitude towards hard narcotics with certain individual considerations (the trial judge considered the nature of the crime, he heard and demonstrated familiarity with mitigating facts and arguments, referred to Foss' former drug habits, provided comment regarding the rehabilitative value of prison and, even having done so, the First Circuit looked askance upon the sentencing process because of the court's statements demonstrating a sentence formulated according to the class or category of crime).**

In the case at hand, the trial judge made no substantive expression of concern, patience or receptivity which would demonstrate individualization of the sentencing process. While it is true that the trial judge made comments directed at the family needs of defendant's children and his (defendant's) station in life (A. 396a-397), a more accurate examination of

*In Foss the trial judge exclaimed, among other things, that "hard narcotics in my opinion demand hard sentences." 501 F.2d 522, 525.

**The First Circuit commented:

"The judge's remarks in the present case, while reflecting a stern policy, fall short - we do not say by much - of the impermissible." 501 F.2d 522, 529.

the entire sentencing minutes reveals the underlying, distorted purpose of the sentence i.e., punishment formulated to fit the category of crime, not the individual offender; punishment couched in terms of an announcement failing to serve the goals of specific deterrence, rehabilitation, incapacitation and retribution. Unlike Foss, the trial judge here manifested no real concern toward the individual. The government under the guise of an argument aimed at the need for general deterrence chooses to ignore the fact that the sentence was formulated by the class and category of crime without the judicial exercise of discretion which is so essential to the sentencing process.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

DORAN, COLLERAN, O'HARA,
POLLIO & DUNNE, P.C.

By Robert A. Kennedy

Robert A. Kennedy
A Member of the Firm
1461 Franklin Avenue
Garden City, New York 11530
Tel. (516) 248-5757

Attorneys for Defendant-
Appellant, Anthony Napoli

Of Counsel,

Robert A. Kennedy, Esq.
Robert J. Aurigema, Esq.
William M. Savino, Esq.
Stephen J. Smirti, Jr., Esq.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -
ANTHONY NAPOLI,
Defendant-Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York
That on the 30th day of August, 19 77 at One St. Andrews Plaza
New York, N.Y.

deponent served the annexed

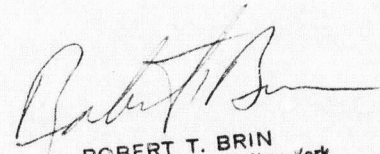
upon

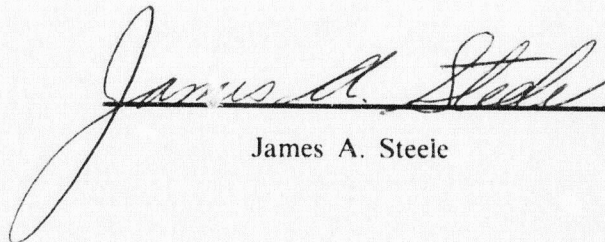
Reply ~~XXXXX~~
Brief

U.S. Atty Southern Dist
Robert Fiske

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 30th
day of August, 19 77


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


James A. Steele